

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Application of SBC Communications, Inc. Pursuant)	
to Section 271 of the Telecommunications Act of)	WC Docket No. 02-306
1996 to Provide In-Region, InterLATA Services in)	
California)	
)	

COMMENTS OF ERNEST COMMUNICATIONS, INC.

Ernest Communications, Inc. (“Ernest”) files these comments in opposition to SBC Communications, Inc.’s (“SBC’s”) application under Section 271 of the Communications Act of 1934, as amended (“Act”), for in-region long distance authority for California (“Application”).¹ Ernest recently learned that SBC is engaged in what appears to be a “price squeeze” that will preclude competitors, such as Ernest, from serving the pay telephone line market in California. In reviewing the Application, the Commission should determine whether SBC is engaged in such a price squeeze and, if SBC is so engaged, the Commission should deny the Application on the grounds that SBC has failed to meet the requirements of checklist item 2 for nondiscriminatory pricing for network elements and/or that a grant of the requested authorization is not consistent with the public interest.

Before a Bell Operating Company (“BOC”) is permitted to offer interLATA long-distance service, the Commission must determine that the BOC is complying with a detailed, 14-point “competitive checklist” and that the “requested authorization is

¹ Ernest’s comments are filed in response to the Commission’s Public Notice (DA 02-2333) issued September 20, 2002 in the above-captioned proceeding.

consistent with the public interest , convenience and necessity.” 47 U.S.C § 271(c)(2)(B) and (d)(C)(3). Based on Ernest’s recent experience in attempting to compete with SBC in providing pay telephone lines to payphone service providers (“PSPs”) in California, SBC is engaged in a price squeeze that is inconsistent with the public interest requirement of section 271(d)(C)(3) and that evidences rates for network elements that do not satisfy the nondiscriminatory requirements of section 271(c)(2)(B)(ii). Specifically, Ernest understands that SBC is offering PSPs pricing for payphone lines that is below what Ernest, as an unbundled network element platform (“UNE-P”) provider, must pay SBC for the network elements that Ernest requires to provide comparable service to PSPs. *See* Declaration of Paul Masters attached hereto.

Ernest estimates that its costs of purchasing network elements from SBC to provide payphone line service to PSPs in California are in the \$12.00 to \$13.00 range. *Id.* The facts available to Ernest indicate, however, that SBC is offering PSPs a mix of rebates and discounts that yield an effective rate per line as low as approximately \$8.00 per month (*id.*), *i.e.*, a rate far below the TELRIC prices that Ernest must pay SBC on a UNE-P basis for the same line. As a result, Ernest is not faced here with the prospect of minimal profits in competing with SBC in the California payphone line market, but with being “doomed . . . to failure” in that market. *Sprint Communications Co. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. 2001).

Such discriminatory pricing by SBC appears on its face to be an egregious example of a price squeeze against a local service competitor. Such a price squeeze has long been recognized as a fundamentally discriminatory and anti-competitive practice. *See, e.g., FPC v. Conway Corp.*, 426 U.S. 271 (1976). In the context of an ILEC’s Section 271 application, evidence of a price squeeze weighs significantly against a finding that granting

the application is in the public interest. *See Sprint*, 274 F.3d at 555 (“as the Act aims directly at stimulating competition,” satisfying Section 271 public interest standard may require the Commission to address a potential price squeeze). Of course, an apparent price squeeze of this egregious sort also constitutes discriminatory pricing, which would violate the “competitive checklist” requirement for nondiscriminatory access to and pricing of UNEs. 47 U.S.C. § 271(c)(2)(B)(ii).

Ernest understands that the Commission has generally required substantial evidence of a price squeeze before it can become a basis for denying a section 271 application. *See, e.g., Application by Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket No. 02-157, Memorandum Opinion and Order, rel. Sept 25, 2001, ¶¶ 142-62 (“*New Hampshire Order*”). Having just learned of SBC’s pricing actions, Ernest is not yet in a position to provide here a detailed price squeeze analysis. Nevertheless, if Ernest’s understanding of the facts is correct,² there is a *prima facie* case that SBC is engaged in a particularly injurious form of price squeeze.³ Either SBC has set rates for the UNEs that Ernest must purchase too high (and thus would not meet the UNE pricing requirements of checklist item 2) or SBC is providing PSPs with below-cost pricing (thus engaging in a price squeeze that would warrant denial of the Application under the public interest standard). And either way, SBC is price-discriminating against a competitor –

² We note that on September 27, 2002, Mpower Communications Corp. – another competitor of SBC – filed a complaint against SBC with the California Public Utilities Commission making allegations similar to those that Ernest makes herein.

³ To the extent the Commission believes that any price squeeze analysis must address resale (*see, e.g., New Hampshire Order*, ¶ 155), we note that Mpower, in its complaint, alleges that the SBC discounted pricing is not tariffed. As such, it is doubtful that SBC makes such pricing available for resale at the wholesale discount.

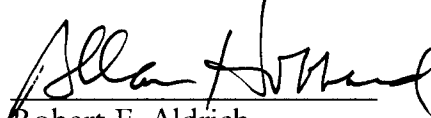
discrimination which is not justified by any state policy supporting below cost pricing of payphone lines. *Cf. Application by Verizon New England, Inc. et al., for Authorization To Provide In-Region, InterLATA Services in Vermont*, 17 FCC Rcd 7625, 7663, ¶ 68 (2002) (declining to deny Section 271 application based on alleged price squeeze involving subsidized local residential rates).

Given the statutory time constraints associated with processing the Application, and given that SBC possesses the key data regarding a price squeeze, the Commission should require SBC to produce immediately the information that will enable the Commission to determine whether SBC has engaged in price squeeze activities. Such information should include, at a minimum, any and all instances in which SBC has, within the last six months, offered rebates and/or volume and term discounts to PSPs that result in prices that effectively are below the payphone line rates set forth in SBC's California tariffs.

Based on the information SBC produces, the Commission would be in a position to determine whether SBC has met the UNE pricing requirements of checklist item 2 and whether a grant of the requested authorization would be consistent with the public interest standard of section 271(d)(C)(3). Absent SBC compliance in producing such information, the Commission should reject the Application.

Dated: October 9, 2002

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Allan Hubbard", written over a horizontal line.

Robert F. Aldrich
Allan C. Hubbard
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DECLARATION OF PAUL MASTERS

I, Paul Masters, state:

1. I am President and part owner of the competitive local exchange carrier ("CLEC") Ernest Communications, Inc. ("Ernest"). Ernest's offices are located at 6475 Jimmy Carter Boulevard, Suite 300, Norcross, Georgia 30071.

2. Ernest is a CLEC that provides local exchange service to independent payphone service providers ("PSPs"). Ernest is certificated as a CLEC in 24 states, including California.

3. Approximately 90 days ago, Ernest began to market competitive local exchange service to PSPs in California.

4. On information and belief, Pacific Bell's current monthly rates for UNE-P, including the vertical switch features necessary to provide service to PSPs, averages between approximately \$12.00 and \$13.00.

5. I recently have been informed by both customers and potential customers who operate payphones in California that Pacific Bell is currently offering PSPs rebates and discounts off of the local exchange service retail rate. The discounts are based on a number of factors including order volumes, term commitments, agreement by the PSP to use Pacific Bell as its presubscribed intraLATA carrier and agreement to choose Pacific Bell as the local exchange

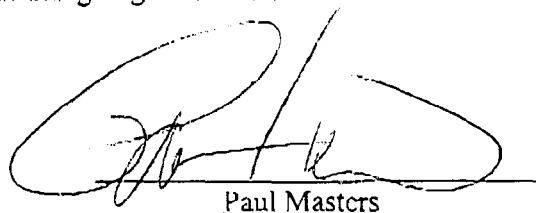
carrier for payphones installed by the PSP in the future. One of Ernest's customers informed me that these discounts reduced the effective retail rate to approximately \$11.00 – well below Pacific Bell's UNE-P rate of \$12.00.

6. Another customer informed me that Pacific Bell offers PSPs a substantial up-front payment in the event that an independent PSP agrees to change its service provider from a competitive provider to Pacific Bell. The customer conveyed to me that this substantial payment plus the discounts discussed in paragraph 5 above, reduce the effective retail rate to approximately \$8.00.

7. Pacific Bell is providing the same services as Ernest to the same PSP service market that Ernest seeks to serve. Ernest cannot compete against Pacific Bell in that market at the UNE-P rate offered by Pacific Bell. Ernest is losing existing customers and finding it very difficult to gain new customers. For Ernest to compete, the UNE-P rate must be sufficiently lower than the discounted retail rate to allow Ernest to recover the cost of the UNE-P rate and other costs that Ernest incurs in providing service. Upon information and belief, however, the UNE-P rate is higher than the effective retail rate alone.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: October 9, 2002



Paul Masters

CERTIFICATE OF SERVICE

I do hereby certify that I have this 9th day of October 2002 served the following parties to this action with a copy of the foregoing **Comments of Ernest Communications, Inc.** by electronic mail to the parties listed below.

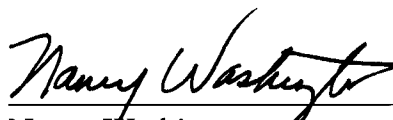
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